No. 90-1624

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

DANIEL-MARC AUGER, CHANTAL-MARISE AUGER, all minors, by their father, next friend and natural guardian, RAYMOND AUGER,

Petitioners,

vs.

ANTOINETTE TENEYCK, individually; STEVEN TENEYCK, individually; DR. JANET BERSON, individually; KENNETH S. DOMZALSKI, individually and as an employee of the law firm of Bookbinder, Guest and Domzalski; BRIAN GUEST, individually and as an employee of the law firm of Bookbinder,

(Continued)

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT DR. JANET BERSON

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Guest and Domzalski; LU-ANN WATSON and PAUL SNYDER, individually and as employees of the law firm of Marshall, Dennebey, Warner, Coleman and Goggin; DR. JULIAN FREEMAN, individually; JUDGE JAMES A. YOCUM, Municipal Court Judge of Moorestown, New Jersey; JUDGE CORNELIUS SULLIVAN, JUDGE MARTIN HAINES, JUDGE ANTHONY TUNNEY, JUDGE DOMINICK FERRELLI, JUDGE MYRON GOTTLIEB, JUDGE VICTOR FRIEDMAN, Individually and as Superior Court Judges of New Jersey; JUDGE MICHAEL KING, JUDGE WARREN BRODY, JUDGE JULIO ASHBEY, JUDGE JAMES H. COLEMAN, JUDGE WILLIAM M. D'ANNUNZIO, JUDGE ROBERT MUIR, individually and as judges of New Jersey Appellate Court; CHIEF JUSTICE ROBERT WILENTZ, individually and as Judge of the Supreme Court of New Jersey,

Respondents.

QUESTIONS PRESENTED

1. Is the petition for writ of certiorari procedurally correct as to respondent Dr. Berson?

2. If petitioner's writ is procedurally correct, then is the Third Circuit's affirmance of the district court opinion reversible error?

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No. 90-1624

In The

Supreme Court of the United States

October Term, 1991

DANIEL-MARC AUGER, *et al.*,

Petitioners,

vs.

ANTOINETTE TENEYCK, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT DR. JANET BERSON

OPINIONS BELOW

1. Opinion of the United States Court of Appeals for the Third Circuit (unpublished), rendered November 26, 1990. (*See* Appendix A to Petition for Writ of Certiorari.)

2. Opinion of the United States District Court for the District of New Jersey by the Honorable John C. Lifland, U.S.D.J. (unpublished), rendered April 6, 1990. (*See* Appendix B to Petition for Writ of Certiorari.)

3. Opinion of the United States District Court for the District of New Jersey by the Honorable John C. Lifland, U.S.D.J. (unpublished), rendered June 28, 1990. (*See* Appendix A to Respondent's Brief in Opposition, *infra* at 1ra.)

STATEMENT OF JURISDICTION

The issue of jurisdiction as to this petition is discussed in Point I, *infra*, and the Court is respectfully directed to respondent's argument therein.

COUNTER-STATEMENT OF THE CASE

Petitioner Raymond Auger's complaint, alleging violation of his civil rights and proporting to set forth a cause of action under 42 U.S.C. § 1983; 42 U.S.C. § 1985; and 42 U.S.C. § 1986, was filed on July 17, 1989. Subsequent thereto, an amendment was filed on July 27, 1989. The complaint's genesis is found in a matrimonial dispute between petitioner and his former wife Antoinette Teneyck which occurred in 1982. The dispute was the subject of numerous proceedings in the state courts of the State of New Jersey: in particular, the Superior Court of New Jersey, Chancery and Law Divisions; the Superior Court of New Jersey, Appellate Division; and the Supreme Court of the State of New Jersey. According to the record below all state court proceedings were decided adversely to petitioner Auger, evidently prompting his decision to seek recourse in the United States District Court for the District of New Jersey.

In the United States District Court for the District of New

Jersey, the petitioners sought redress against 22 defendants, including the following:

> Antoinette Teneyck, his former wife; Steven Teneyck, his former wife's new husband; Kenneth Domzalski and Brian Guest, attorneys for the Teneycks; Paul Schneider and Lu Ann Watson; counsel for Dr. Berson in the state court proceedings; Dr. Julian Freeman, an orthodontist; the Honorable James Yocum, a municipal court judge; 13 members of the New Jersey state judiciary, including the Chief Justice; and this respondent, Dr. Janet Berson, a court-appointed psychologist called upon to render an opinion as to petitioner's status as a parent.

The theories as to all defendants relate to their participation in the state court proceedings, *i.e.*, that their participation in these proceedings violated his civil rights.

By way of procedural history, Dr. Janet Berson was served with petitioners' complaint on August 19, 1989. Due to the fact that her prior counsel was named in the federal court lawsuit, an obvious conflict of interest was created. She was forced to seek new counsel and referred the matter to her insurance carrier. After thorough review, the carrier assigned the file to Dr. Berson's present counsel. The forgoing process took approximately 45 days. During this 45-day span, the petitioner Raymond Auger filed his notice of motion for default and default judgment. Dr. Berson cross-motioned to file a responsive pleading out of time. In the interim, other defendants filed motions to dismiss the complaint against them for failure to state a claim.

All pending motions came before the United States District Court on April 9, 1990, when the Honorable John C. Lifland, U.S.D.J. entered a memorandum and order dismissing the complaint as to all the defendants who had sought such relief.

As to the remaining defendant, Dr. Berson, he allowed the filing of a responsive pleading by April 15, 1990. He also denied the petitioner's motion to enter default judgment. A copy of that opinion is attached as Appendix B-1 to the petition for writ of certiorari.

Dissatisfied with the disposition by the district court, petitioner filed a notice of motion for leave to appeal the order of Judge Lifland on May 7, 1990. (*See* respondent's appendix at 4ra.)[1] Subsequent to the filing of petitioner's notice of motion for leave to appeal, respondent Berson filed her notice of motion for summary judgment. The motion was returnable on June 18, 1990. On June 29, 1990, after considering opposition filed by the petitioner, Judge Lifland granted respondent's motion and dismissed petitioner's cause of action. That decision is detailed in a separate memorandum and order of June 28, 1990 and is appended to this respondent's brief in opposition since it was omitted from petitioner's brief and appendix. To date, no notice of appeal of that order has been filed.

It is the position of this respondent that the within petition is procedurally improper. While petitioner attacks the substantive dismissal of the complaint against Dr. Janet Berson, no appeal as to that issue was ever taken. The order from which petitioner sought leave to appeal was the *first* memorandum and order of Judge Lifland. While petitioner may have wanted to appeal the decision granting summary judgment to Dr. Berson, for whatever reason, he chose not to do so.

The order from which petitioner actually filed notice for leave

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1. Petitioner's notice for leave to appeal was originally directed to the United States Supreme Court, however it was accepted and filed by the clerk of the United States Court of Appeals for the Third Circuit in spite of its procedural deficiency.

to appeal is the order which entered summary judgment as to other defendants. However, this order only allowed the filing of a responsive pleading out of time as to this respondent. Thus, any appeal of this issue would necessarily be interlocutory.

Interlocutory appeals require written certification of the interlocutory question by the trial judge in the memorandum and order. As is evidenced by 28 U.S.C. § 1292(b), discussed in Point I, *infra*, this certification is a prerequisite for appellate jurisdiction. No such certification was ever given in this case.

On November 26, 1990, the United States Court of Appeals for the Third Circuit issued its decision affirming the United States District Court for the District of New Jersey. A petition for rehearing *en banc* was denied by the United States Court of Appeals for the Third Circuit on January 25, 1991. Whereupon, Raymond Auger, through his present counsel, filed his petition for a writ of certiorari to this judicial body.

For the reasons discussed hereafter, respondent Dr. Janet Berson most respectfully submits that the petition for writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI IS PROCEDURALLY DEFICIENT AS TO RESPONDENT DR. JANET BERSON AND SHOULD BE DENIED.

Petitioner invokes the jurisdiction of this Court in reliance upon 28 U.S.C. § 1254(1). This statute provides as follows:

> § 1254. Courts of appeals; certiorari, certified questions.
>
> Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Petitions for writ of certiorari are governed by United States Supreme Court Rule 10, which provides as follows:

> Rule 10. Considerations Governing Review on Writ of Certiorari.

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States Court of Appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

As will be demonstrated, the within petition fails to pass muster under the above statute and rule and accordingly should be denied.

In order to more fully understand the chronology of events in this case a simple chart is illustrative:

A. July 17, 1989,
Plaintiff filed pro se complaint.

B. July 27, 1989,
Plaintiff filed amendment to pro se complaint.

C. September 29, 1989,
Plaintiff filed motion for default and default judgment returnable, November 6, 1989.

D. October 20, 1989,
Respondent Dr. Janet Berson filed a motion to file answer out of time.

E. November, 1989,
Defendants filed various motions to dismiss.

F. Honorable John C. Lifland, U.S.D.J. issued first opinion granting summary judgment as to remaining defendants and allowing respondent Berson to file answer by April 16, 1990.

G. April 16, 1990,
Respondent Berson complied with order and filed answer.

H. May 7, 1990,
Plaintiff filed notice for leave to appeal to United

States Court of Appeals for Third Circuit as to April 6 order of Honorable John C. Lifland.

I. May 22, 1990,
Respondent Berson moved for summary judgment as to the plaintiff's complaint against her.

J. June 26, 1990,
Honorable John C. Lifland, U.S.D.J. entered second order granting summary judgment as to respondent Berson (*see* respondent's appendix at 1ra-3ra).

As is plainly evident from the above list, petitioner's notice for leave to appeal was filed on May 7, 1990: more than 2 weeks prior to the date when this respondent moved for summary judgment in the United States District Court for the District of New Jersey. As petitioner's notice for leave to appeal illustrates, petitioner sought review of the April 6, 1990 district court opinion of the Honorable John C. Lifland, U.S.D.J. (*see* respondent's appendix at 4ra-5ra). Thus, the only potentially appealable issue as to this respondent would have been whether the district court erred in allowing respondent to file her answer out of time. It is this precise question as to Dr. Berson that was before the United States Court of Appeals, and, it is this same question that is before this Court now.

It appears that this Court lacks jurisdiction to determine this case as to Dr. Janet Berson. Since the April 8th memorandum and order of Judge Lifland did not resolve all issues as to all parties, the appeal must be deemed to be interlocutory. Interlocutory appeals are governed by 28 U.S.C. § 1292 which provides as follows:

§ 1292. Interlocutory decisions

> (a) Except as provided in subsection (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, except where a direct review may be had in the Supreme Court; . . . .
>
> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Paragraph (b) of the above rule clearly indicates that a trial judge must certify the question before an interlocutory appeal is allowed. Numerous opinions also hold that without such certification there is no appellate jurisdiction. *See e.g., Barfield*

v. Weinberger, 485 F.2d 696 (5th Cir. 1973). In the present case, the trial judge did not certify any interlocutory question, therefore no appellate review is available as to respondent.[2] Petitioner fails to address the issue above and instead turns directly to an examination of the allegations against Dr. Berson. This practice is erroneous under the cited law and mandates a denial of the petition.

In summary, the petition for certiorari should be denied because the order of final judgment as to Dr. Berson was never properly appealed and because the order from which petitioner has appealed is an uncertified interlocutory order for which there exists no appellate jurisdiction.

II.

THE PETITIONER'S WRIT OF CERTIORARI SHOULD BE DENIED ON SUBSTANTIVE GROUNDS AS WELL.

Even if this Court were to address petitioner's argument on a substantive basis, the petition should be denied. The crux of petitioner's argument is that the district court failed to give proper treatment to the *pro se* complaint. In particular, petitioner suggests that the district court failed to consider the conspiracy argument under 42 U.S.C. § 1985 and 42 U.S.C. § 1986. A review of the opinions below shows that this is patently untrue.

When looking at petitioner's complaint as to this respondent, the Court will find only three (3) allegations. These allegations are set forth at page 14 of the petition for writ of certiorari and need not be repeated. Suffice to say that the "allegations" are

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2. While the subsequent dismissal of the case as to Dr. Berson may have rendered moot the question of interlocutory appeal as to other respondents, no appeal was ever filed as to the substantive dismissal of Dr. Berson.

mere conclusory statements which fail to show a cause of action under 42 U.S.C. § 1983, § 1985 or § 1986.

The district court correctly held, and the Third Circuit correctly affirmed, the determination of no cause of action as to respondent. The opinion of the Honorable John C. Lifland, U.S.D.J. indulgently characterized petitioner's complaint under 42 U.S.C. § 1983. In fact, it can hardly be said petitioner's complaint sets forth a cause of action at all. Therefore, the district court's treatment of the complaint was more than just.

Upon evaluating respondent's motion for summary judgment, the court opined that respondent Berson was not a "state actor" for the purpose of 42 U.S.C. § 1983. The court correctly cited to the prior decisions in *Hall v. Quillen*, 63 F.2d 1154 (4th Cir. 1980) and *Andersen v. Glisman*, 577 F. Supp. 1506 (D. Col. 1984). In addition, the court also found that petitioner produced no evidence to substantiate an inference that any court official influenced Dr. Berson. Most importantly, the court also found that there was "*no allegation that Dr. Berson conspired with any state actor to violate plaintiff's civil rights*" (emphasis added) (*see* respondent's appendix at 3ra). A plain reading of the last paragraph of the June 28, 1990 opinion of the district court reveals the thorough consideration given below to petitioner's complaint.

While petitioner argues that the district court failed to consider all allegations of the petitioner's *pro se* complaint, it is, however, obvious that the district court clearly gave all favorable inferences to the petitioner.

It is respectfully submitted that the decision of the United States District Court for the District of New Jersey dismissing the complaint as to Dr. Janet Berson was proper and appropriate. Even under the liberal construction of pleadings under Federal Rule of Civil Procedure 8(b), the petitioner's complaint failed

to pass muster. Moreover, the United States Court of Appeals for the Third Circuit Court appropriately affirmed the decision. Hence, the petition for writ of certiorari should be denied.

CONCLUSION

For the forgoing reasons it is respectfully submitted that the petition for writ of certiorari is procedurally improper and substantively unsupported by the facts. Therefore, respondent, Dr. Janet Berson, respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

THOMAS D. FLINN
Counsel of Record
GARRITY, FITZPATRICK,
GRAHAM, HAWKINS &
FAVETTA, P.C.
Attorneys for Respondent
Dr. Janet Berson

APPENDIX A — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED JUNE 28, 1990

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO.: 89-3982 (JCL)

DANIEL-MARC AUGER, ET AL.,

PLAINTIFFS,

v.

ANTOINETTE TENEYCK, ET AL.,

DEFENDANTS.

MEMORANDUM AND ORDER

LIFLAND, District Judge

Raymond Auger brings this *pro se* civil rights action individually and on behalf of his two minor children. At the heart of the action is a matrimonial dispute between Raymond Auger and his former wife Antoinette Teneynk. Presently before the court is defendant Dr. Janet Berson's motion for summary judgment. After review of the papers submitted pursuant to *Fed. R. Civ. P.* 78, the court grants the motion for the following reasons.

The facts underlying this litigation are detailed in the court's

Appendix A

Order filed April 6, 1990. That order dismissed the action as to all defendants except Dr. Berson.

Plaintiffs have asserted a cause of action under 42 U.S.C. § 1983 against Dr. Berson on the grounds that their constitutional rights were violated because Dr. Berson's custody evaluation was biased in favor of Antoinette Teneynk. The complaint alleges that Dr. Berson "refused to hear fully and at length the father Raymond Auger," Complaint at ¶ 40; that Dr. Berson "wrote her report to the court with less than 5% knowledge of the facts, events, incidents, or attitudes she was appointed to investigate," Complaint at ¶ 41; that Dr. Berson "refused to interview the father's many witnesses," Complaint at ¶ 42; that Dr. Berson made her recommendation despite her awareness of Antoinette Teneyck's refusal to share custody of the children, Complaint at ¶ 43; that Dr. Berson admitted to Raymond Auger that his side was not given enough consideration, Complaint at ¶ 44; and that Dr. Berson "refused the request of Raymond Auger to correct three gross errors in her report to the court," Complaint at ¶ 45.

Dr. Berson moves for summary judgment on the ground that a court-appointed physician is not a state actor within the meaning of 42 U.S.C. § 1983.[1] The relevant inquiry is whether Dr. Berson's actions can be fairly attributed to the state. A determination whether there is sufficient state action must be made by weighing

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1. In the alternative, Dr. Berson contends that plaintiffs' cause of action is precluded by the statute of limitations. The applicable statute of limitations in this case is the New Jersey Personal Injury Statute, which is two years. *See Wilson v. Garcia*, 471 U.S. 261 (1985); N.J.S.A. 2A:14-2. Dr. Berson has not indicated by way of affidavit or other proof the date of termination of her relationship with plaintiffs. Accordingly, Dr. Berson's motion for summary judgment on the statute of limitations ground is denied.

the particular circumstances of each case.

Dr. Berson was appointed by the state trial court to recommend who should have custody of the minor children. It is undisputed that her evaluation was performed under the authority of the court. However, the mere fact that a private party's actions were performed pursuant to court appointment does not make those actions fairly attributable to the state. *See Thomas v. Howard*, 455 F.2d 228 (3d Cir. 1972) (court-appointed attorney is not a state actor); *Hall v. Quillen*, 631 F.2d 1154 (4th Cir. 1980) (court-appointed physician is not a state actor); Anderson v. Glismann, 577 F.Supp. 1506 (D. Col. 1984) (court-appointed psychiatrist is not a state actor). Plaintiffs have produced no evidence supporting an inference that the state court judge or any other court official influenced Dr. Berson's decision. In addition, there is no allegation that Dr. Berson conspired with state actors to violate plaintiffs' constitutional rights.

Accordingly,

IT IS on this 28th day of June, 1990 ORDERED that Dr. Berson's motion for summary judgment is granted.

s/ John C. Lifland
JOHN C. LIFLAND
United States District Judge

APPENDIX B — NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT FILED MAY 7, 1990

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

File No. 8903082 (JCL) Civil Action

DANIEL-MARC AUGER, CHANTAL-MARISE AUGER, all minors, by their father, next friend and natural guardian, RAYMOND AUGER,

Plaintiffs

vs

ANTOINETTE TENEYCK, individually; STEVEN TENNEYCK, individually; DR. JANET BERSON, individually; KENNETH S. DOMZALSKI, individually and as an employee of the law firm of Bookbinder, Guest and Domzalski; BRIAN GUEST, individually and as an employee of the law firm of Bookbinder, Guest and Domzalski; LU-ANN WATSON and PAUL SNYDER, individually and as an employees of the law firm of Marshall, Dennebey, Warner, Coleman and Goggin; DR. JULIAN FREEMAN, individually; JUDGE JAMES A. YOCUM, Municipal court judge of Moorestown, New Jersey; JUDGE CORNELIUS SULLIVAN, JUDGE MARTIN HAINES, JUDGE ANTHONY TUNNEY, JUDGE DOMINICK FERRELLI, JUDGE MYRON GOTTLIEB, JUDGE VICTOR FRIEDMAN, Individually as as Superior Court Judges of New Jersey; JUDGE MICHAEL KING, JUDGE WARREN BRODY, JUDGE JULIO ASHBEY, JUDGE JAMES H. COLEMAN, JUDGE WILLIAM M. D'ANNUNZIO, JUDGE ROBERT MUIR, individually and as judges of New Jersey Appellate Court; CHIEF JUSTICE ROBERT WILENTZ, individually and as Judge of the Supreme Court of New Jersey,

Defendants

Appendix B

NOTICE OF APPEAL

Notice is hereby given that Plaintiffs above named Raymond Auger, Daniel-Marc Auger and Chantal-Marise Auger, hereby appeal to the United States Supreme Court from a final judgment, opinion. From the order describing it, Civil Action No. 89-3082 (JCL). Raymond Auger's cause of action be and the same is hereby dismissed; and that the Plaintiffs' motion is hereby denied, Entered in this action, April 6, 1990.

Violations of the Plaintiffs' first Amendment rights to peace and privacy in the parent-child relationship; Violations of the Plaintiffs' fifth Amendment of property rights to a parent-child relationship; Violations of the Plaintiffs' Eighth Amendment by cruel and unusual punishment; Violations of his Thirteenth Amendment by involuntary servitude (fees ordered and denied); Violation of his fourteenth Amendment right to due process and equal protection under the law; Violation of Seventh Amendment right to a jury trial for civil rights violations; Judge's conflict of interest; Intentional Infliction of cruelty and Emotional Distress; Violations of freedom of speech rights and systematic denial of justice and physical intimidation by Judge Ferrelli to deny and attempt to deny due process and justice by the judiciary and associates. Title 42 U.S.C. 1983, 1985 or 1986.

s/ Raymond Auger
RAYMOND AUGER, PRO SE
10 Bretton Way
Mount Laurel, New Jersey 08054

May 5, 1990